

# SENATE BILL REPORT

## SI 164

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As Passed Senate, April 18, 1995

**Brief Description:** Private property regulation.

**Sponsors:** People of the State of Washington.

**Brief History:**

**Committee Activity:** Government Operations: 3/30/95.

Passed Senate, 4/18/95, 28-20.

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### SENATE COMMITTEE ON GOVERNMENT OPERATIONS

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**Background:** Constitutional Provisions. The state Constitution includes several provisions relating to governmental actions and property.

One type of state constitutional provision generally precludes governments from giving or lending anything of value to persons or private entities. (See Article VIII, Sections 5 and 7, Washington State Constitution.) The federal Constitution does not include similar provisions.

Another type of state constitutional provision prohibits governments from taking property for public use without paying just compensation and prohibits governments from depriving a person of property without due process of law. (See Article I, Section 16, Washington State Constitution, which relates to eminent domain and actions that are commonly called a "taking" of private property; and Article I, Section 12, Washington State Constitution, which is the Privileges and Immunities provision and includes what is commonly known as the Due Process and Equal Protection provisions.) The federal Constitution includes similar provisions.

In a variety of lawsuits, courts have determined whether a particular governmental action is an unconstitutional "taking" of private property. Initially, courts only considered an actual physical occupation of land to constitute an unconstitutional "taking" of private property. However, in various decisions this century, courts have expanded restrictions contained in these constitutional provisions and held that a regulation of private property could constitute an unconstitutional "taking" of private property. This newer type of taking is called a "regulatory taking" of private property or an "inverse condemnation."

Among other factors, a court considers the following when determining if a regulation is an unconstitutional "taking" of private property:

- o Whether the regulation destroys a fundamental property right, such as the right to possess the property, exclude others from the property, or dispose of the property.

- o Whether the regulation imposes substantial limitations on the use of property and, if so, the balance between the purpose of the regulation and the extent of the reduction in use of and the economic impact on the property.
- o The balance between the extent to which the regulation interferes with the property owner's reasonable investment-backed development expectations and the government's interest in promulgating the regulation.
- o If the regulation prohibits all economically viable or beneficial uses of the property, whether the regulation enforces nuisance law or other preexisting limitations on the use of the property.

Generally, the entire parcel as a whole is considered in the analysis and not individual portions of the parcel.

State and Local Regulations. State law and local ordinances impose a variety of regulations on private property, including requirements to obtain a building permit authorizing the construction of a building, controls on the division of land, restrictions on land uses, and restrictions on causing air or water pollution. In addition, the State Environmental Policy Act requires that state agencies and local governments determine if a proposed governmental action may significantly affect the quality of the environment.

Many of these regulatory programs involve issuing permits or altering a zoning ordinance to authorize a proposed activity and the applicant is required to file plans, maps, or studies describing the proposed activity.

A county and city zoning ordinance may allow a variety of differing land uses in different areas or zones designated within its jurisdiction. Other restrictions limit construction activities that are allowed on a portion of a parcel, including "set back" requirements restricting how close to a boundary line a building may be located and "lot coverage" restrictions on the percentage of a parcel that may be covered with impervious surfaces.

Process to Determine if a Regulation Constitutes an Unconstitutional "Taking" of Private Property. The state Growth Management Act requires the Attorney General to develop a recommended "process" enabling state agencies and local governments to evaluate proposed regulations or administrative actions to assure that such actions do not result in a violation of the constitutional provisions prohibiting "takings."

This "process" is a summary of case law and includes factors that should be reviewed by a government when considering the adoption or implementation of regulations. The Attorney General reports in these materials that most governmental regulations do not constitute unconstitutional "takings" of private property.

Public Nuisances. State law defines nuisances and public nuisances.

A nuisance is an unlawful act, or failure to perform a duty, which: (a) annoys, injures or endangers the comfort, repose, health or safety of others; (b) offends public decency; (c) unlawfully obstructs the passage on any body of water, park, road or street; or (d) in any

way renders other persons insecure in life or in the use of property. A party who is injured by a nuisance may bring a lawsuit to enjoin the nuisance.

A public nuisance is a nuisance that affects equally the rights of an entire community or neighborhood. In addition, several statutes describe particular activities or actions that constitute a public nuisance. Among others, statutes declare the following to be public nuisances: (a) allowing an animal carcass, offal, filth, or noisome substance to remain in any place to the prejudice of others; (b) obstructing or encroaching upon a public highway; (c) establishing a powder magazine near a city or town at a point different from that appointed by the city or town governing body or within 50 rods of any occupied dwelling; (d) using any building for a trade, manufacture, or employment that is occasioned by obnoxious exhalations, offensive smells, or otherwise is offensive or dangerous to the health of people or the public; (e) premises where liquor is sold to the public in contravention of law; and (f) places where vagrants resort.

Appropriate public officials, and any person who is specially injured by a public nuisance, may bring a lawsuit to enjoin a public nuisance. In addition, any person who is specially injured by a public nuisance may abate or destroy the public nuisance if such action may be committed without a breach of the peace or doing unnecessary injury.

Assessed Valuation for Property Tax Purposes. The determination of the assessed valuation, or "true and fair" value, of property by a county assessor for purposes of imposing property taxes must be consistent with land use regulations and other governmental policies and practices that are in effect when the appraisal is made.

**Summary of Initiative:** New Statutory Standard. A new statutory standard is established to determine if governmental regulations constitute a "taking" of private property for which compensation must be paid. This new statutory standard is broader than the court-established standards determining whether regulations constitute an unconstitutional "taking" of private property. Many regulations that do not constitute an unconstitutional "taking" of private property would appear to constitute a statutory "taking" of private property.

Except for regulations precluding a public nuisance, any governmental regulation limiting the use or development of a parcel of private property "for public benefit" is considered to be a statutory "taking" of property for which the government imposing the regulation must pay compensation. The term "for public benefit" is not defined. The same compensatory requirement applies to any governmental regulation limiting the use or development of a portion of a parcel of private property.

Private property includes land, any interest in land, any proprietary water right, and any crops, forest products, or resources capable of being harvested or extracted that are protected by the Fifth or 14th Amendments to the United States Constitution.

The compensation that is required to be paid is the reduction in fair market value of the parcel, or portion of the parcel, attributable to the regulation or restriction. Compensation must be paid within three months of when the regulation or restraint occurs. A government may not deflate the value of the property by suggesting or threatening a designation to avoid paying full compensation to the owner.

A 10 year statute of limitations is established during which a lawsuit may be instituted for compensation under these provisions. A prevailing plaintiff is entitled to recover the costs of litigation, including reasonable attorneys' fees.

The state must compensate another governmental entity for its liability under these provisions if a state law or state agency mandates that the other government take the action causing the liability.

Analysis and Delay. A government is prohibited from adopting a regulation of private property or imposing a restraint of land use unless the government prepares a statement containing a full analysis of the total economic impact on private property. The analysis must be available to the public at least 30 days prior to adopting the regulation or imposing the restraint.

If the government chooses to adopt a proposed regulation of private property or restraint of land use, only the regulation or restraint with the least possible impact on private property that accomplishes the necessary public purpose may be adopted.

Access to Property. A government must either provide alternative access to property at its own expense, or purchase inaccessible property, if the government places restrictions on the use of public or private property that deprive a landowner of access to his or her property.

Plans, Maps, Studies, etc. A government may not require a private property owner to provide or pay for any studies, maps, plans, or reports used in decisions to consider "restricting the use of private property for public use." The term "restricting the use of private property for public use" is not defined.

Assessed Valuation. The county assessor is required to adjust property valuation for tax purposes and notify the owner of the new tax valuation, which must be reflected and identified in the next tax assessment notice.

**Effective Date of Initiative:** Ninety days after the end of the Regular Session, if the Legislature enacts the Initiative.